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In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF OCEANSIDE, PETITIONER

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner, a California municipality, contends that respondent Federal Emergency Management Agency (FEMA) should have been estopped from denying coverage under a federal flood insurance policy on the basis of petitioner's failure to file a proof of loss form within 60 days of the loss, as required by the Standard Flood Insurance Policy.

1. Under the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, the federal government makes flood insurance available on reasonable terms to "persons who have need for such protection." 42 U.S.C. 4001(a). The standard insurance contract issued by FEMA makes the filing of a sworn proof of loss within 60 days of a flooding incident a condition precedent to recovery under the contract. See 44 C.F.R. Pt. 61 App. A(2), ¶ P at 221; *id.* ¶ U at 222; 44 C.F.R. 61.13.

FEMA issued a flood insurance policy covering the contents of a structure owned by petitioner. That policy contained the standard provision that in the event of loss petitioner was required to present FEMA with a proof of loss form within 60 days in order to recover on the policy. On February 18, 1980, petitioner's sewage treatment plant was damaged by flood waters. Petitioner filed a notice of loss estimating the amount of damage on April 2, 1980; however, it never filed the proof of loss form required by the policy. On December 12, 1980, FEMA denied petitioner's claim on the ground that the damaged equipment was located outside the structure whose contents were insured under the policy. See Pet. App. B2.

Petitioner brought suit in the United States District Court for the Southern District of California seeking enforcement of the insurance contract. FEMA filed a motion to dismiss or, in the alternative, for summary judgment, contending, inter alia, that petitioner's claim was barred by its failure to file a sworn proof of loss within 60 days of the loss. The district court granted summary judgment for FEMA on that basis (Pet. App. B1-B4). The court rejected petitioner's claim that FEMA should be estopped from relying on the failure to file a proof of loss because the agency was aware of the loss, had failed to provide petitioner with a proof of loss form, and had conducted an investigation of the loss.

The court of appeals affirmed in an unpublished memorandum opinion (Pet. App. A1-A5). The court held that petitioner had not established the traditional elements necessary to estop a private litigant, let alone the heightened requirements for an estoppel against the government. The court concluded that there was no reason for petitioner to be ignorant of the proof of loss requirement and that

petitioner's failure to file a proof of loss was not due to any reliance on the statements or conduct of government agents.

2. Petitioner's contention that the courts below erred in refusing to estop FEMA from denying coverage based on petitioner's failure to file a timely proof of loss form is without merit.[1] As this Court recently noted, "it is well-settled that the Government may not be estopped on the same terms as any other litigant." *Heckler* v. *Community Health Services,* No. 83-56 (May 21, 1984), slip op. 8. *Community Health Services* makes clear that, at a minimum, a private party seeking to estop the government must demonstrate with clarity that all the traditional elements for estoppel of a private party are present. *Id.* at 9.

The court of appeals correctly concluded that the undisputed facts in the record demonstrated that petitioner could not establish two elements necessary to estoppel of a private party. First, there was no reason for petitioner to be ignorant of the true facts, since the Standard Flood Insurance Policy, 44 C.F.R. Pt. 61 App. A(2), at 221, clearly sets forth the proof of loss requirement and since petitioner acknowledged that its employees had access to the policy and were familiar with its terms. See Pet. App. A4. Second, petitioner failed to show reasonable reliance on any statements or conduct of government agents; indeed, petitioner's employee testified that "he relied on his experience that private insurance companies waived proof of loss, '99.9% of the time * * *.' " *Ibid.* Thus, on these facts even a private insurance

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[1]Petitioner's second question presented refers to the possibility that FEMA might be deemed to have waived the proof of loss requirement in this case. However, paragraph D of the Standard Flood Insurance Policy states that no provision of the policy may be waived, except in writing. See 44 C.F.R. Pt. 61 App. A(2), at 217. It is undisputed that there was no written waiver of the proof of loss condition in this case. See Pet. App. A3.

company could not have been estopped. See *Goodwin* v. *Hartford Life Insurance Co.*, 491 F.2d 332 (3d Cir. 1974) (declining to estop an insurance company from denying liability where eligibility for coverage was defined in the insurance policy and contract).[2]

3. Petitioner contends that there is a conflict among the circuits with respect to whether FEMA may rely on the proof of loss requirement when the agency has received actual notice of a claim, but has failed to request submission of a proof of loss form, and a claims adjuster continues to investigate the loss after the expiration of the 60-day period within which the proof of loss is to be filed. It relies primarily on *Meister Bros., Inc.* v. *Macy*, 674 F.2d 1174 (7th Cir. 1982). But the court in *Meister Bros.* stated expressly that its decision was "limited to the unique circumstances of this case" and was not intended "to intimate in any way an appropriate standard for resolution of future cases" (*id.* at 1177). The court held there that FEMA could not rely on the plaintiff's failure to satisfy the proof of loss requirement when sworn proof of loss statements were filed several months late by the plaintiff, the claim was thoroughly investigated, and partial payment was made on the claim. In the court's view, it would have been inequitable under these circumstances to deny plaintiff full recovery simply because the proof of loss form had not been filed

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[2]Petitioner characterizes the requirement that a proof of loss be tendered within 60 days as a "technical policy condition" (Pet. i). In fact, the requirement is an important one. It is designed, inter alia, to expedite the orderly processing of claims; to enhance the prospects for settlement; to ensure against fraud (which is more likely to occur when the claims process is extended and a claimant is not required to assess and swear to the amount of his estimated loss); and to enable FEMA to determine actuarially the amount of short-term reserves that will be necessary to satisfy claims. While in some cases a notice of loss form or investigation by an adjuster might serve some of these purposes, they clearly would not serve all of them.

precisely within 60 days. In this case, by contrast, no proof of loss form was ever filed, and no payments were made to petitioner.

Moreover, in *Meister Bros.*, unlike this case, the court did not make any finding that the plaintiff would have been unable to prove the elements of estoppel against a private party. Indeed, the court there noted specifically (674 F.2d at 1176) that FEMA "does not contend that the traditional elements of estoppel are not present." On that ground alone, this case is clearly distinguishable from *Meister Bros.*[3] Furthermore, since *Meister Bros.* was decided before

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[3]The court in *Meister Bros.* stated that FEMA, in issuing flood insurance, "was not in any sense acting in a sovereign capacity * * * but was engaged in essentially a private business." 674 F.2d at 1177. But this Court long ago held that provision of insurance by the federal government "is not an ordinary commercial undertaking, and * * * the rules of law whereby private insurance companies are rendered liable for the acts of their agents are not bodily applicable to a Government agency * * * unless Congress has so provided." *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 383 n.1 (1947). See also *id.* at 383 ("[i]t is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures"). Indeed, Congress created the flood insurance program "as a matter of national policy" (42 U.S.C. 4001(a)(3)), based on the finding that "many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions" (42 U.S.C. 4001(b)(1)).

Petitioner also cites *West Augusta Development Corp.* v. *Giuffrida,* 717 F.2d 139 (4th Cir. 1983), in support of its claim that there is a conflict among the circuits. But that decision is entirely consistent with the decision in this case. In *West Augusta Development Corp.*, as in this case, the court concluded that the plaintiff could not estop FEMA because it had failed to make out the elements of estoppel against a private party, in particular the requirement of reasonable reliance. See *id.* at 141.

this Court issued its decision in *Community Health Services*, the extent to which *Meister Bros.* remains good law is uncertain. Finally, because the court of appeals' opinion in this case is unpublished, any conflict would be of minimal significance and would not warrant the Court's attention.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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